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THE RULE OF LAW AND PRIVATE LAW

William Lucy*

I. STARTING POINTS

Let's begin with our loosely contemporary, vaguely canonical, generally jurisprudential statements of the rule of law – by which I mean those offered by Lon L Fuller, H L A Hart and Joseph Raz.¹ At first glance, this starting point generates a pretty unpromising answer to the question 'what is the relation between private law and the rule of law?' The answer is unpromising because the relation, viewed from the perspective of these accounts of the rule of law, *seems* negligible. One reason for this is that private law itself is more or less absent from these accounts. As a general matter, private law is no more obviously in play in Fuller's jurisprudential work than in either Raz's or Hart's sole-authored work,² although we know contract law occupied a sizeable part of Fuller's professional life.³ Private law appears hardly at all in those areas of these scholars' work that is most concerned with the rule of law. Fuller, we all recall, is preoccupied with law-giving and law-creating in ch II of *The Morality of Law* and that, possibly because of the example of Rex, looks to contemporary eyes a lot like the work of the state in general and the legislature in particular.⁴ If you are in the business of making law, then attend to Rex's failures and the eight desiderata – generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility, constancy and congruence – they contravene. Private law is ready-made law and Rex's

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¹ L L Fuller, *The Morality of Law* (New Haven: Yale UP, rev ed., 1969), henceforth 'ML' in text and notes; HLA Hart, 'Problems of the Philosophy of Law', ch 3 of his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon 1983), hereinafter 'PPL' in text and notes; H L A Hart, *The Concept of Law* (Oxford: Clarendon, 2nd ed., 1994) 206-207; J Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195-211 ('RoLV' in text and notes). A more expansive discussion would have to add a fine recent account of the rule of law (N E Simmonds, *Law as a Moral Idea* (Oxford: Clarendon Press 2007)) to this quartet, as well as F A Hayek's earlier contributions: *The Constitution of Liberty* (London: Routledge 1960), Part II, and *Law, Legislation and Liberty* (London: Routledge 1973), Vol 1.

² But see H L A Hart and T Honore, *Causation in the Law* (Oxford: Clarendon, 2nd ed., 1985).

³ L Fuller and W R Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46 *Yale Law Journal* 52-96 and 'The Reliance Interest in Contract Damages: 2' (1937) 46 *Yale Law Journal* 373-420 and L Fuller and M Eisenberg, *Basic Contract Law* (West: St Paul, 8th ed 2006; 1st ed., 1947). See also S Gerber 'Corbin and Fuller's Cases on Contracts (1942?): The Casebook that Never Was' (2003) 72 *Fordham Law Review* 595-628 + Appendix, for an account of a book stillborn.

⁴ Note also this oft-quoted remark: "the very essence of the Rule of Law is that in acting upon the citizen . . . government will faithfully apply rules previously declared as those to be followed by the citizen": ML, 209-10.

mistakes seem of little instructional value unless our task is to create private law anew (along the lines, perhaps, of a *supra*-national code).⁵

The impression that the rule of law is pre-eminently the business of law-makers – a view henceforth dubbed ‘the public law perspective’ – is reinforced when we turn to the discussions of Hart and Raz. Hart’s principles of legality are clearly all of a piece with Fuller’s eight desiderata, in the sense that the perspective animating the discussion is that of law-maker, on the one hand, and the addressee of the law, on the other. The main difference between Hart and Fuller, setting aside their rather unhelpful discussion of the moral status of the eight desiderata, is that Hart’s account of the rule of law is more expansive than Fuller’s. For, in addition to Fuller’s eight desiderata, Hart includes principles of natural justice and impartiality within the rule of law (or principles of legality). He also has a principle of “congruence between judicial decisions and the enacted law” (*PPL*, 115) which is different from, because *prima facie* narrower than, Fuller’s desideratum of “congruence between official action and declared rule” (*ML*, 81).

Raz’s account of the rule of law is similar to Hart’s in two obvious ways. First, the perspective that predominates in his discussion is essentially the same as that which animates Hart’s: it is what we might call ‘the public law perspective’, that of law-maker and addressee of the law. Raz is not, however, completely blind to possible connections between the rule of law and private law: “though the rule of law concerns primarily private citizens as subject to duties and governmental agencies in the exercise of their powers . . . it is also concerned with the exercise of private powers . . . [p]ower-conferring rules are designed to guide behaviour and should conform to the doctrine of the rule of law if they are to be capable of doing so effectively” (*RoLV*, 199). But he does not subject this likely connection to scrutiny.

Second, Raz follows Hart in increasing the number of rule of law principles and carries out an expansionary manoeuvre of his own. That is, Raz, like Hart, incorporates the principles of natural justice within the rule of law but goes beyond Hart by adding four supplementary requirements to what is now a list of 10 or 11 desiderata or principles. They are: that “the courts should be easily accessible” (*RoLV*, 201), that “the independence of the judiciary must be guaranteed” (*ibid*, 200), that the courts have review powers over other rule of law desiderata and, finally, that “[t]he discretion of the crime preventing agencies should not be allowed to pervert the law” (*RoLV*, 201).

⁵ For a step in the recent EU codification project, see the Draft Common Frame of Reference at http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf. Corroborating evidence that the perspective of law-maker and addressee of the law dominates Fuller’s discussion in *ML* can be found in K Rundle, *Forms Liberate* (Oxford: Hart Publishing 2012), ch 1.

While these accounts of the rule of law are interestingly expansive, being nowhere near as ‘thin’ or ‘formal’ as some discussions would lead us to think, they are also uninteresting from the perspective of private law. It might be right that the requirements that courts must have review powers, that judges and courts should be independent, that there be easy access to the justice system, and that there be no wide discretionary powers, are part of the best understanding of the rule of law. But these requirements, along with Hart’s three additional principles, don’t speak in any *unique* way to private law. The approximately 15 desiderata of the rule of law with which we are now faced are assuredly of general importance in our thinking about law and legal-institutional design. But what, if anything, do they say that is of pre-eminent salience to private law? At face value, not much.

These three canonical discussions of the rule of law can, however, become more explicitly relevant to private law, and the public law perspective on the rule of law thereby de-centred, by taking three steps. The first might seem quite unrelated to the other two: it consists of bringing our thoughts about the rule of law, on the one hand, and arbitrary power, on the other, into closer relation. I think there are good reasons for doing this regardless of any interest in the relationship between private law and the rule of law: they amount, in sum, to the claim that a clear view of the nature of arbitrariness, which shows it to be neither a uniquely public law nor even a uniquely legal notion, generates a better understanding of the rule of law. Arbitrariness can flourish in non-legal contexts just as much as in private law and public law contexts, but it is usually equally objectionable in all. And what is objectionable about it is, in part although perhaps not in whole, that it subverts or undermines many of the values and conditions the rule of law ideal is alleged to serve.

The second step elucidates these values, but with a twist. The latter is prompted by the insights of those philosophers who have relatively recently attempted to disinter a lost or certainly somewhat overlooked strand of political thought addressed, in the main, to the ills of arbitrariness and domination. This reformulation is not a vital part of my argument here, since I am uncertain – for reasons articulated below – whether or not a dispute about how the values served by the rule of law should be characterised is worth resolving. My argument is, rather, a defence of two claims: (i) that private law protects against arbitrariness in much the same way as does the rule of law; and (ii) that the values served by the rule of law are also to some extent served by private law.⁶

⁶ I also believe, although I make no attempt to support it here, that these same values are served by and embodied in public law.

The third step which brings the rule of law and private law into closer alignment involves a slight, but for some unacceptable, expansion of our understanding of the rule of law.⁷ This expansion illustrates another deep similarity – found in the notion of juridical equality – between private law and the rule of law. The first two steps are taken in the following sections of this essay and in the order just sketched; the third step is, however, a task for another occasion.⁸ So as to avoid any confusion with other, more expansive conceptions of the rule of law, and also for ease of exposition, I amalgamate Fuller’s, Hart’s and Raz’s conceptions of the rule of law into one in what follows and label it ‘RoL1’. Note also that the two steps taken here are certainly not the only way of exploring the relationship between the rule of law and private law. Another obvious path has been eschewed and it is worth noting why. We could describe this path as the ‘rule of law audit strategy’, whereby some or other segment of private law is judged against some conception of the rule of law, the outcome of the audit being positive, negative or neutral. That path is not pursued here for a very simple and prosaic reason: it is fruitfully and illuminatingly travelled by a number of other essays in this volume.

II. ARBITRARY POWER AND THE RULE OF LAW

The effort to loosen the public law perspective that seemingly dominates discussion of the rule of law is not the only reason for bringing arbitrary power and the rule of law into closer contact. There are independent reasons for juxtaposing these two notions. Chief among these is that it simply aids our understanding of the nature of the rule of law to compare it with what it is not, namely, arbitrary power.⁹ More specifically, the aid is at least two-fold. First, contrasting the rule of law with something like its opposite serves to highlight some of the standards against which any acceptable account of the rule of law should be judged. Among those standards we should include, at the outset at least, fit with common intuitions as well as ordinary vocabulary and modes of thought and speech. And I suggest that one uniquely relevant hunch exists in ordinary thought and speech that deserves close attention: the idea that if there is some ‘thing’ that the rule of law is certainly not, then that is arbitrary power.

⁷ Note Raz’s caution that the rule of law “is not to be confused with democracy, justice, *equality (before the law or otherwise)*”: *RoLV*, 196 (emphasis mine).

⁸ I have taken some steps toward delineating the relevant conception of juridical equality in ‘Equality Under and Before the Law’ (2011) 61 *University of Toronto Law Journal* 411-465.

⁹ There is plainly a circularity here, of the unavoidable hermeneutic kind, which reminds us that, in the social world, we need to know what we are looking for (or talking about) and thus what we are not looking for (or talking about) before we begin the search (or conversation). Which is to say neither that we need to know every detail of what we are looking for in advance, nor that our search will not refine and perhaps even change its ostensible object.

Second, contrasting the rule of law with arbitrariness reminds us of a somewhat neglected value – freedom as non-domination – that the rule of law embodies or serves. It is unlikely that Fuller, Hart and Raz were blind to this specific value, but they did not articulate it in anything like the perspicuous vocabulary now available to us. While this vocabulary is ancient, it was rediscovered only relatively recently. The value it articulates thus received scant explicit attention from Fuller, Hart and Raz and has been somewhat neglected by jurists ever since. The other values embodied in the rule of law, while only incrementally sketched by Fuller, are explicitly articulated by Hart and Raz, even though they are often said to underestimate their worth. It is, however, more accurate to say that Hart and Raz have frequently been interpreted *as if* they underestimate the worth of these values. It is thought necessary for them to downplay these values because a wholehearted statement of their worth supposedly imperils other jurisprudential theses Hart and Raz defend.¹⁰ The values served by or embodied in the rule of law form one bridge between it, on the one hand, and private law, on the other, for those values are also served by and embodied in private law.

Although it has been claimed that “‘arbitrary power’ is a difficult notion” (*RoLV*, 203), this should neither inhibit our interest in the idea nor reduce its role in any discussion of the rule of law. If arbitrary power is close to being the opposite of the rule of law, then an account of the former should illuminate the latter. So, our question is, what is arbitrary power? As soon as we pose this question another immediately demands attention: how should we go about answering that question?

We have neither time nor need to explore the methodological precepts and injunctions of jurisprudence and legal philosophy. Within that realm, as within many other social sciences, we require what is sometimes called a ‘pre-reflective’ – but better named a ‘pre-theoretical’ – understanding of the idea, domain, conduct, institution or practice that constitutes our area of interest. If one’s topic is the gift-giving practices of the Azande, or contemporary common law understandings of the rule of law, an obvious starting point is the understandings members of those subject groups have of the practice or notion in question. Those understandings are first revealed to us in the language of those groups. What, then, does our own language reveal to us about the notion of arbitrariness and its cognate, arbitrary power? There are at least two not necessarily incompatible ways of answering this question. First, by a large scale empirical study in which this question is posed of a sample group, their answers collated and valued. Second, by asking any single competent user of the language in question not just this question,

¹⁰ A fine corrective to the common view that Raz and Hart regard the rule of law as only instrumentally valuable is M Bennett, ‘Hart and Raz on the Non-Instrumental Moral Value of the Rule of Law: A Reconsideration’ (2011) 30 *Law and Philosophy* 603-635.

but closely related questions designed to elucidate ‘what we should say when . . .’.¹¹ Answers to these questions can also be found indirectly, in the wider culture of these language users, such as commentary upon and reaction to contemporary events and in standard sayings, adages, exemplary stories and other sources.

As a user of our language, it seems to me that fellow citizens and lawyers may have at least four slightly different scenarios in mind when sincerely making a claim of arbitrariness. Attending to these scenarios ensures that arbitrariness is indeed a fairly expansive notion which may need to be cut down to size in some circumstances. However, it is surely preferable to err in this direction as opposed to stipulatively reducing the notion’s range, since a more expansive approach can alert us to nuances and differences we would otherwise miss.¹²

One situation in which the rebuke of arbitrariness is appropriate is when power (or control or force)¹³ is deployed without warrant and legitimacy. The mugger taking my wallet at knife-point or the complete stranger chastising a child each count as instances, albeit at different points on a spectrum. The mugger has no claim at all to my wallet and no warrant for the threat of force she deploys. The complete stranger is in a similar situation with regard to the child – what distinguishes him from relatives or carers or teachers is that the latter group have some normative warrant for becoming interested in and thus interfering with the child’s conduct. Our judgments here suggest that, while it is in some circumstances entirely appropriate for parents and others to chastise children, it is almost never appropriate for strangers to do so. Equally, our judgments suggest that the non-consensual taking of another’s holdings is almost never appropriate. Part of the sense of ‘impropriety’ in these two sentences is, of course, given by ‘illegitimate’, where we mean not just that some deed or conduct is impermissible but also that it is wrong. We can call this type of arbitrariness ‘S1’ arbitrariness.

¹¹ This echoes the very brief remarks on a certain kind of philosophical method in J L Austin, *Philosophical Papers* (Oxford: Clarendon 1961), 130.

¹² The *OED* contains four meanings, all of which overlap with those outlined below. In our English public law textbooks, neither ‘arbitrariness’ nor ‘arbitrary’ exercises of power receive much sustained attention (for an exception, see T Endicott, *Administrative Law* (Oxford: Clarendon 2009), 4-9), it seemingly being taken for granted that lawyers will know arbitrariness when they see it. The notion also sometimes crops up in more jurisprudential discussions of the rule of law, albeit almost always rather fleetingly. Two examples are D Dyzenhaus, *The Constitution of Law* (Cambridge: CUP 2006) 2 and TRS Allan, *Constitutional Justice* (Oxford: Clarendon Press 2001) at 2-3, 11-12 and 15.

¹³ There are distinctions worth drawing between the members of this trio (‘force’ might, for instance, be the exercise of ‘power’ that is resisted, and ‘power’ might be displaced without ‘control’). In what follows I ignore these and use ‘power’ as a generic term to cover all three instances. I do not, however, use it to encompass either the ‘conduct of conduct’ or its allegedly close relative, bio-power/bio-politics: see N Rose, *Powers of Freedom* (Cambridge: CUP 1999) for a superb overview of these issues.

There is a second, related but narrower scenario in which judgments of arbitrariness are at home. This scenario includes all those situations in which power is exercised without warrant by those who usually or sometimes have warrant to exercise power. This scenario differs from the first because there is at some point here a legitimately conferred or assumed power, but the power that is actually exercised goes beyond that conferral or is unrelated to it. The conferral of power and the power itself can be either juridical or non-juridical: the power's source can be a body of law or a specific legal rule, on the one hand, or some non-legal rule or body of rules, on the other. With regard to legal powers, A V Dicey was keen to point out that Englishmen (and presumably women) were not subject to this kind of arbitrariness, unlike their French counterparts. Voltaire, Dicey noted, had good reason to know the difference between being ruled by law and being the victim of "caprice".¹⁴ It was the latter that led to Voltaire being beaten and subsequently imprisoned by the Regent's lackeys in 1717. Some of those lackeys – the guards at the Bastille, for example – and the Regent himself (Philippe II d'Orleans) did indeed have legal powers to do certain things. But in this instance they had no legal power at all to beat and imprison Voltaire. They did so in part because they could do so without running the risk of the law being applied to them. They thus had lawful warrant for some areas of their activity and *de facto* impunity in relation to others.

The security and immigration service personnel complicit in the abduction and rendition of Maher Arar similarly had lawful warrant for some of their activities. Just about all such personnel are legally empowered to do a range of things which, without legal warrant, would be unlawful. They are not, however, lawfully empowered to abduct suspected terrorists, mislead their lawyers and then remove them from one jurisdiction to another, so that they can be imprisoned and tortured. Not only did those personnel lack lawful authority to do that, their doing so was contrary to a number of legal obligations they were required to uphold in the discharge of their duties.¹⁵ Regrettably, these personnel have now been indirectly granted immunity for their misdeeds by the US Supreme Court.¹⁶

¹⁴ *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund 1982 (reprint of the 8th ed., 1915)), 111. Voltaire was imprisoned in the Bastille twice: once for 11 months, from May 1717, which is presumably the instance Dicey has in mind, and again for two weeks in 1726, as a result of the machinations of the Chevalier de Rohan.

¹⁵ *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf), accessed 15th May 2012 and see D Cole, 'Getting Away with Torture' (<http://www.nybooks.com/articles/archives/2010/jan/14/getting-away-with-torture/?pagination=false>), accessed 15th May 2012. It would be foolish to think that only US security and immigration forces overreach themselves: for a small but still disturbing instance, see *The Guardian*, 20th August 2013, 1.

¹⁶ See D Cole, 'He was Tortured but he Can't Sue', <http://www.nybooks.com/blogs/nyrblog/2010/jun/15/he-was-tortured-but-cant-sue/>.

The second scenario has another slightly different juristic version which lawyer's might well call the '*vires* version'. In English public law, bodies that hold and exercise public powers can sometimes exceed the authority – usually an empowering statute – that grants those powers. When they do so, they act *ultra vires*. The conduct of the public body that exceeds its powers is usually related to that in which the body has lawful authority to engage, but comes about either because of a misunderstanding of the range or nature of their authority, or because of irregularities in the process of exercising it, or because the body made a decision that no reasonable body could have made.¹⁷ There is a similarity between this instance and the kind of exercise of power without any warrant at all that was characteristic of the US security services' dealings with Maher Arar: both bodies, after all, had legal warrant to do some things. However, the key difference is that the *vires* scenario is usually one in which a power is mistakenly or unwittingly exceeded; in the Arar type of case, power seems to be exercised deliberately and regardless of any warrant.

One final point should be noted about what will henceforth be called 'S2 arbitrariness': it can occur in non-legal realms as well in the legal realm, even in its '*vires*' guise. More or less formal bodies of rules – the FIFA rules of the game for association football, for example – confer powers, duties and entitlements upon players of the game and officials and it is perfectly possible for power-holders to exceed their powers. It would be rare but is nonetheless conceivable for a referee to mistake the range of her powers. She might, for example, think that her power to insist that players take the field in appropriate and safe attire not only allows her to exclude from the field players wearing jewellery but also those with tattoos. A decision to exclude players with tattoos would currently be regarded as an obvious instance of the referee exceeding her powers.

A third scenario – 'S3 arbitrariness' – in which arbitrariness is a rebuke is that in which a decision-maker exercises power inconsistently. All referees in association football have the power, in some circumstances, to award a penalty kick and all parents have the legal and moral power to discipline their children in certain circumstances. The referee who awards a penalty against team Y in circumstances X, but who does not award a penalty against their opponents, team Z, in circumstances X, will assuredly be subject to accusations of arbitrariness or inconsistency. So, too, will the parent who disciplines child 1 for deed A but not child 2 for the same deed in the same circumstances.

The inconsistent exercise of a legitimately held power often leads to two additional and closely connected worries. One is the prospect of a failure of impartiality, the other the chance of improper

¹⁷ See H W R Wade and C Forsyth, *Administrative Law* (Oxford: Clarendon Press, 10th ed., 2009), part IV. Note that the last ground for judicial review, particularly in its irrationality guise, is probably best viewed as a form of S4 arbitrariness.

differential treatment. Real life instances of the referee and parent examples would quickly generate accusations of favouritism or partiality and such partiality is often – invariably? – a way of treating two similarly situated parties differently. This differential treatment need not, but often has, objectionable grounds. In the referee example, her partiality could be the result of more or less reprehensible bias: she could simply be a fan of team Y, but she might also be a racist, favouring team Y because it has more players of the ethnicity she prefers. Either way, there is a serious breach of her duty to interpret and apply the rules of the game impartially. That breach grounds the claim that her decision-making is arbitrary. It seems it is just this type of lapse that Raz has in mind when he says that “an act which is the exercise of power is arbitrary *only* if it was done either with indifference as to whether it will serve the purposes which alone can justify its use or with belief that it will not serve them” (RoLV, 203). The referee’s decisions to favour team Y with the award of a penalty in circumstances X, and to deny team Z the award of a penalty in the same circumstances, cannot in any circumstances accord with the purposes of the penalty rule. However, if the previous and following analysis is correct, then Raz is mistaken in thinking that this is the *only* scenario in which the exercise of power can be appropriately described as arbitrary. It is one such scenario of three (the following scenario does not, in some instances, entail an exercise of power).

The fourth kind of scenario – ‘S4 arbitrariness’ – in which arbitrariness is a salient issue is that in which a decision, deed or course of conduct is marked by a defect of reason. I use that term to highlight only two distinct rational short-comings, not all possible rational defects that any particular deed or course of conduct might display. The first short-coming, which might not actually be appropriately regarded as such, arises when a deed or course of conduct is under-determined by reason. We could imagine, for example, asking someone who had picked a particular car to drive ‘why did you choose a pink car?’ and receiving the reply: ‘no reason’. This is unlikely to be a statement affirming that there was no reason at all to pick a car but, rather, an affirmation that there was no specific reason to pick that particular car, given that a choice of car had to be made. While there was reason to pick a car, there was no salient or compelling reason to pick that car. The choice of the pink car was therefore under-determined by reason. That very under-determination by reason informs the charge of arbitrariness: it highlights the fact that there was no better reason to pick the pink car than any other car – any other colour of car was equally likely to be chosen. Such instances, which are ones in which the selector is indifferent between options and thus selects in the absence of either compelling or particularly salient reasons, have been dubbed instances of ‘picking’. ‘Choosing’, by contrast, is said to refer to those

instances when options are selected on the basis of compelling or salient reasons.¹⁸ If 'arbitrariness' does indeed rightly characterize the under-determined nature of instances of picking, it is worth noting that this charge is not quite as damning here as it might be in scenarios one to three. For, rather than disclose objectionable partiality or the illegitimate exercise of power, instances of picking might simply mark the limits of reason in some contexts. It is this consideration that suggests we are not really dealing with a rational short-coming here but with a truth about reason itself.

The second short-coming is in some instances a genuine short-coming. The charge of arbitrariness is *prima facie* appropriate here because the situation is one in which there are no reasons at all for some deed or course of conduct, the deed or course of conduct not being a 'mere' reflex or the like. Individuals whose conduct is often or always reason-less are perhaps best characterised as wantons, lacking autonomy.¹⁹ Those whose conduct is sometimes or occasionally reason-less might well be either experimenting with acting on whim (some think this makes them so much more 'interesting' than their peers), chance or unthinkingly following in everyone else's tracks.²⁰ They might even have reasons for not coming up with reasons for their conduct. I shave in the way I do because that's the way I've always shaved and it seems an absurd waste of time to think about this, never mind to come up with reasons why it is a good way of shaving, how it compares with other ways etc. etc.. When Dicey speaks of Voltaire being subject to the Regent's 'caprice', this surely being a near relative of 'whim', it seems unlikely that he has in mind an instance of reasonless conduct. Rather, the caprice here is the unwarranted or illegitimate exercise of sheer physical power over Voltaire, for which the Regent and his lackeys certainly had reasons.²¹ By contrast, when Raz says that "[a] ruler can promote general rules based on whim . . . without offending the rule of law" (*RoLV*, 202-203), reasonless conduct must be exactly what he has in mind. For, if he has the kind of caprice involved in Voltaire's treatment in view, then that obviously offends rule of law principles. It is also worth noting that recent developments in administrative law in England suggest that reason-less exercises of power by public bodies are indeed antithetical to the rule of law.²²

¹⁸ "Choosing is choosing for a reason": E Ullman-Margalit and S Morgenbesser, 'Picking and Choosing' (1977) 44 *Social Research* 757-785 at 758.

¹⁹ H Frankfurt, 'Freedom of the Will and the Concept of a Person', ch 2 of his *The Importance of What We Care About* (Cambridge: Cambridge UP 1988).

²⁰ On trusting to chance, a fiction classic is L Rheinhart, *The Dice Man* (1971).

²¹ The Gods, too, might have their reasons, but being in their power is nevertheless objectionable, as Gloucester lamented after a particularly bad day: "As flies to wanton boys are we to th' gods, they kill us for their sport": *The Tragedy of King Lear*, Act 4, sc 1, l 36.

²² I have in mind the trend towards a *general* duty to give reasons which, although not universally recognised by the English courts, is regarded by some judges as lurking on the horizon of judicial possibility. The obvious starting

It is useful to note how many and which of the four types of arbitrariness matches up with which components of our three sample conceptions of the rule of law. This enterprise serves to illuminate the degree to which the hunch affirmed at the beginning of this section – that arbitrariness and the rule of law can be meaningfully contrasted – is plausible. Of the 15 principles of RoL1 – generality (1), promulgation (2), non-retroactivity (3), clarity (4), non-contradiction (5), possibility (6), constancy (7), congruence (8), natural justice (9), impartiality (10), adjudicative congruence (11), accessibility (12), judicial independence (13), power of review (14) and limited discretion (15) – almost none directly engage with S1 arbitrariness. The exercise of power without warrant is not something that rule of law principles regulate. But, by existing clearly beyond the range of those principles, such exercises of power usually advertise their own egregious nature: commitment to the rule of law, after all, requires living under and through law. Ostensibly legally legitimate exercises of power are usually genuinely legitimate if and when carried out in accord with principles 1, 2, 4, 5, 6, 7, 8, 9 and 10. That is to say: if they are warranted by a general and intelligible public rule of some kind, exercised consistently and in accord with that rule, while also complying with the rules of natural justice and the requirements of possibility, non-contradiction and impartiality. Unlike the latter, the prior two requirements of possibility and non-contradiction are internal to the very enterprise of subjecting human conduct to the governance of rules. But neither RoL1, nor any other conception of the rule of law for that matter, can ensure that power is always exercised legitimately (although they might generate the assumption that it should be).

Legal instances of S2 arbitrariness are usually also determined to be such by reference to many of the same principles of RoL1 just listed: 1, 2, 4, 6, 7, and 8. We can only know if and when an exercise of power is within its grant when we know and understand the rule that grants it and its conditions. That the power exercised must require conduct that is possible follows from the fact that recourse to a rule-granted and rule-bounded power is intelligible only as an effort to subject human conduct to the governance of rules. Inconsistency is the core of S3 arbitrariness and thus principles 4, 7, 8, 9 and 10 are the salient ones here, 1 and 2 being taken for granted in the identification of the power-conferring rule or rules under which power is exercised or a decision taken. That the power must be exercised impartially and in accord with natural justice serves as a limited bulwark against inappropriate and thus possibly inconsistent decision-making. Principles 8, 9 and 10 of RoL1 are evidently necessary for diagnosis of and protection against S4 arbitrariness in the legal context. Whether or not decision-makers have a duty to give reasons for their decisions and exercises of power, their decisions must almost

point is *R v Ministry of Defence, ex parte Murray* [1997] EWHC Admin 1136. A recent analysis of the duty is in *R (on the application of KM) (by his mother and litigation friend JM) (FC) (Appellant) v Cambridgeshire County Council (Respondent)* [2012] UKSC 23.

always be ostensibly impartial and congruent with the grant under which the power is exercised. To determine the latter, we are thrown back upon principles 1, 2 and 4.

Is it possible to say, as a result of this brief analysis, that there is a *significant* connection between arbitrariness and RoL1? The connection affirmed in the hunch at the beginning of this section and bolstered in the previous few paragraphs is this: in the juridical context the link is that arbitrariness is often the antithesis of the rule of law, telling us what is wrong when many RoL1 principles are breached. The objection to arbitrariness in the legal domain is that each of its instances almost always either directly or indirectly contravenes rule of law principles - when the latter are breached, arbitrariness is afoot. Is this a significant link between these two notions? Moreover, is the link such as to give good reason for maintaining that *all* accounts of the rule of law, and not just RoL1, must be answerable to some or all instances of arbitrariness? If we can identify arbitrariness without recourse to the principles of either RoL1 or of any other conception of the rule of law, then there seems to be little reason why the latter must be constructed with the former in mind.

That we can indeed identify arbitrariness without recourse to rule of law principles seems plain: not all instances of arbitrariness are legal. Setting aside the possibility of non-legal analogues of RoL1 principles, this means that the category of 'arbitrariness' exceeds both that of 'the rule of law', on the one hand, and 'the legal', on the other. Principles of RoL1, or of any other conception of the rule of law for that matter, are thus not necessary conditions of all instances of arbitrariness, especially as at least two instances of the latter (S1 and S4 arbitrariness) can be defined without recourse to rule of law principles. Furthermore, some RoL1 principles clearly do not speak directly and explicitly to any of the four instances of arbitrariness. Access to justice (12) and the power of review over other desiderata (14) might both serve indirectly to impede some instances of arbitrariness, but it seems misleading to say that this is their only burden. And even if non-legal equivalents to principles 1-10 of RoL1 are in play in non-legal manifestations of S1-S4 arbitrariness, this does not establish anything like a direct entailment between these principles and arbitrariness. For what stands between arbitrariness and rule of law principles is, of course, the category 'law': only instances of arbitrariness that fall within the latter domain trigger a rule of law 'alert', with recourse to and interrogation of desiderata 1-15 of RoL1.

That the juxtaposition of rule of law principles and types of arbitrariness illustrates one of the important values that the rule of law serves, and that arbitrariness subverts or denies, is not on its own completely satisfactory. For, if this is part of an argument to show that there is a *significant* connection between arbitrariness and the rule of law, we might be accused of smuggling in a particular account of the value of the rule of law in an improper way. The charge is that this value only becomes salient

because of our invocation of the various types of arbitrariness and not as a result of our account of the rule of law. So: is there something else that might be said in favour of linking RoL1 (or other accounts of the rule of law) with an account of arbitrariness?

One suggestion is that, while RoL1 principles are not necessary conditions of non-legal arbitrariness, those principles and arbitrariness are related within the juridical realm because they function together as contrastive concepts. This much is implicit in the claim that arbitrariness tells us what is wrong when many rule of law principles are breached. If arbitrariness and RoL1 are contrastive concepts, then each automatically throws light on the other in any attempt to articulate one.²³ We have many concepts that function in this way: the darkness of a dark suit is usually only meaningful by reference to various degrees of lightness and these, of course, are determined by context. A dark suit for a flamboyant popinjay will presumably be quite different from an undertaker's dark suit. The contrast here is therefore not one between simple opposites but, rather, between a range of possible gradations any two of which can be contrasted. While some contrastive concepts plainly look like simple opposites (black/white; wet/dry; drunk/sober), many legal contrastive concepts are not straightforwardly opposites. Consider, for instance, a determination of the unreasonableness of conduct in negligence law. This is only possible by reference to some understanding of its opposite, namely, reasonable conduct but, as with the concepts 'light' and 'dark', there is an unavoidable degree of imprecision in the delineation of the contrasting poles. We can speak about something being more or less light just as properly as we can talk of conduct (and the standard of care it embodies) being more or less reasonable; we are thus able to draw the salient contrast with various degrees of strength or vividity. There is, furthermore, a large dollop of context-sensitivity in drawing the distinction between this particular pair of legal contrastive concepts. A reasonable standard of care in a highly stressful, emergency situation might well be unreasonable in a relaxed, non-emergency environment.²⁴ Nor is our understanding of what is reasonable and unreasonable (and similar contrastive concepts) so static that the dividing line between them cannot change. What was once regarded as reasonable in situation X can come to be regarded as unreasonable in that same situation.

Another consideration in favour of linking arbitrariness and the rule of law is that the link generates a general, plausible account of what is wrong with breach of rule of law principles. Breaches

²³ Saussure made a similar observation about words: "In a given language, all the words which express neighbouring ideas help to define one another's meaning . . . No word has a value that can be identified independently of what else there is in its vicinity": F de Saussure, *Course in General Linguistics*, translated and annotated by R Harris (London: Duckworth 1983), 114.

²⁴ Two instances: *Watt v Hertfordshire CC* [1954] 1 WLR 835 (CA) and *Daborn v Bath Tramways* [1946] 2 All ER 333 (CA).

of principles 1-10 of RoL1 are almost always instances of S1-S4 arbitrariness and this might well capture our general sense of what is wrong when most rule of law principles are breached. When faced with instances of breach of different principles, my students (i) often think that what is wrong in these various instances is more or less the same; and (ii) they frequently characterise this wrong as arbitrariness or one or more of its cognates (the most commonly articulated expressions being variations on 'being subject to another's power/control/whim'). The discovery of a general wrong in many instances of breach of rule of law principles is helpful and important when compared to the alternative: an incremental list of apparently discrete wrongs. My view is certainly not that there is only one single wrong when rule of law principles are breached, but nor is it that there are 15 separate and discrete wrongs. Rather, one wrong – arbitrariness – is common to numerous instances of breach.

The most sceptical response to the claim that there is a link between arbitrariness and the rule of law – the former often telling us what is wrong when the latter is transgressed – is straightforward denial. Such a denial is problematic principally because it requires that there can be breaches of many (rather than just one or two) rule of law principles that do not in any way implicate S1-S4 arbitrariness. That the breach of some specific rule of law principles need not entail any form of arbitrariness is unremarkable: we have already noted that this is the case with regard to two such principles. But it seems impossible to breach the majority of RoL1 principles without arbitrariness of one form or another. Also, as a general matter, it seems strange to hold that talk of arbitrariness is utterly out of place when faced with breach of many rule of law principles, yet that follows from the hard-headed sceptical view. A more moderate sceptical view, holding that there is indeed a link or overlap between arbitrariness and the rule of law but that it is not particularly significant, seems altogether more plausible.

Given the argument so far, it is tempting to regard RoL1 principles, breach of which often embodies arbitrariness, as central instances of the rule of law. We might, alternatively, claim that they provide an accepted argumentative plateau upon which all other conceptions of the rule of law arise. But the argument here gives no warrant for either of these claims. We have established only a connection between arbitrariness and some of the principles of RoL1, such that the former tells us what is wrong in many breaches of the latter: arbitrariness is not (or the opposite of) the rule of law. That connection cannot of itself support the claim that those principles are more significant or more central than others, nor can it show that those principles must be accommodated – as an argumentative plateau or in some other way – by all accounts of the rule of law. The most our argument has established is a *prima facie* presumption that accounts of the rule of law tell us what is wrong, in

relatively general terms, with breaches of the rule of law. That presumption can surely be rebutted, but a plausible rebuttable must discredit the account of that general wrong just offered: it must reject the claim that breaches of the rule of law often entail arbitrariness of one form or another.

We need now articulate the value or values of RoL1 in such a way as to inform our understanding of the wrong of arbitrariness. For, while hard-headed sceptics might deny that there is any link at all between the rule of law and arbitrariness, more moderate sceptics could question exactly what is wrong with arbitrariness in the first place. The discussion in the next section answers that specific question in the course of providing a general account of the value – or values – of RoL1. But before we turn to that account, one final point must be noted. It is that our elucidation of the different families of arbitrariness does not depend, for its intelligibility, upon the existence of the state in anything like its modern understanding. The fact that we can conceptualise arbitrariness without reference to the state serves as a reminder that we might also be able to conceptualise many of the principles of RoL1 without reference to the state. And that, of course, dislodges the public law perspective: it stops us thinking about the rule of law exclusively in terms of state-centred law-making. Our thinking should therefore perhaps always be initially informed by what Raz calls the rule of law in its literal sense – when “[t]he rule of the law . . . means that people should obey the law and be ruled by it” – rather than the rule of law “in a narrower sense, that the government shall be ruled by the law and subject to it” (*RofLV* 196).

III. THE VALUE OF THE RULE OF LAW AND A BRIDGE TO PRIVATE LAW

The ‘value’ of RoL1 is most likely the sum total of all the particular values it serves or embodies: it seems improbable that there is only one such value and this view is shared by proponents of RoL1. Nor is there significant disagreement among those proponents as to which values are served by or embodied in the rule of law. More awkward is the question of which formulation – ‘served by’ or ‘embodied in’ – best characterises the relationship: are all the pertinent values here immanent within the very idea of the rule of law or are they independent of that idea but advanced, served and protected by it? Or is it the case that some of the pertinent values are immanent while others are not? In what follows, I speak most often of the values ‘served by’ RoL1 but this is merely a matter of linguistic convenience. I remain agnostic here as to which view of the relationship between RoL1 and its salient values is correct; none of the arguments I offer turn on this issue.

The most obvious candidates for the status of values served by RoL1 are the values of dignity, autonomy and liberty (understood as freedom from constraint).²⁵ I treat these values together not just because they overlap to some degree, but also so as to avoid an unfruitful discussion of either the relative merits of each or of which one is truly, genuinely and exclusively compatible with the rule of law, on the one hand, and private law, on the other. So: how might these values be understood?

My answer to this question has two initial parts. First, I chart the contours of these values by letting proponents of RoL1 speak for themselves and then, second, introduce another value that RoL1 seemingly serves. I then, in a third part, broaden the discussion by attempting to show that these values are also advanced by or inform private law and that private law itself serves as a bulwark against arbitrariness in much the same way as does the rule of law. The fourth and final part of the discussion in this section raises an even broader issue: it considers whether or not jurists must choose between the ostensibly different values served by both the rule of law and private law. I argue that there is no need, as a general matter of intellectual clarity, to do so, although a choice might be necessary within the context of specific judicial decisions.

A. In their own words

The advantage of allowing Fuller, Hart and Raz to speak for themselves with regard to the values served by RoL1 is that we avoid the huge amount of secondary comment on their work. In that comment these proponents' own words often slip from view. It is worth therefore reminding ourselves of some of what they say in a relatively direct and unmediated way. Furthermore, allowing these jurists to speak for themselves serves as a corrective to some common misrepresentations of their views.

I begin with the least laconic statement of the values served by RoL1. Of the principles that constitute his 'formal' conception of the rule of law, Raz says this: "[i]t should . . . be remembered that in the final analysis the doctrine rests on its basic idea that the law should be capable of providing effective guidance. The principles do not stand on their own. They must be constantly interpreted in light of the basic idea" (*RoLV*, 202). He adds that:

". . . there are . . . reasons for valuing the rule of law. We value the ability to choose styles and forms of life, to fix long term goals and effectively direct one's life toward them. One's ability to do so depends on the existence of stable, secure frameworks for one's life and actions. The law can help secure such fixed points of reference in

²⁵ I regard liberty and freedom as synonyms here, even though there seem to be reasons against this (H Pitkin, 'Are Freedom and Liberty Twins?' (1988) 16 *Political Theory* 523-552; see 542-544 in particular). For an exception to the general current of neglect, see S Besson and J L Marti (eds.), *Legal Republicanism* (Oxford: Clarendon Press 2009).

two ways: (1) by stabilising social relationships which but for the law may disintegrate or develop in erratic or unpredictable ways; (2) by a policy of self-restraint designed to make the law itself a stable and safe basis for planning. This last aspect is the concern of the rule of law" (*RofLV*, 203).

Raz elaborates this concern thus:

"The second virtue of the rule of law is often . . . identified as the protection of individual freedom. This is right in the sense of freedom in which it is identified with an effective ability to choose between as many options as possible. Predictability in one's environment does increase one's power of action[. . .]. The rule of law may be yet another way of protecting personal freedom. But it has no bearing on the existence of spheres of activity free from governmental interference and is compatible with gross violations of human rights.

More important than both these considerations is the fact that observance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future" (*RofLV*, 203-4).

And, in expanding this notion of dignity, he says

". . . it is clear that deliberate disregard for the rule of law violates human dignity. It is the business of law to guide human action by affecting people's options. . . . Deliberate violation of the rule of law affects . . . one's very ability to decide, act or form beliefs about the future. A legal system which does in general observe the rule of law treats people as persons at least in the sense that it attempts to guide their behaviour through affecting the circumstances of their action. It thus presupposes that they are rational autonomous creatures and attempts to affect their actions and habits by affecting their deliberations. . . . Violations of the rule of law affect one's fate by frustrating one's deliberations, by making it impossible for a person to plan his future to decide on his action on the basis of a rational assessment of their outcome. The rule of law provides the foundation for the legal respect for human dignity" (*RofLV*, 205).

There are, then, at least three closely related values served or protected by RoL1 on Raz's view: liberty, dignity and autonomy. The former is understood as the ability to choose combined with some degree of freedom from constraint; dignity is a matter of respect for individuals' ability to choose, deliberate and plan and autonomy seems to be the culmination of both²⁶: thus 'respecting human

²⁶ The view that dignity is a status-concept rather than a value-concept would suggest that it occupies a different, more encompassing role than the other values in this company. In what follows I assume it is a value-concept, 'merely' one value among others, and that its meaning is more or less exhausted by the statements of Raz and Fuller in the text. For a more nuanced views of dignity, see J Waldron, *Dignity, Rank and Rights* (New York: OUP 2012) and M Rosen, *Dignity: Its History and Meaning* (Cambridge, Mass.: Harvard U P 2012). On dignity as a status-concept, see Waldron, *ibid*, lecture 1 and in his 'How Law Protects Dignity' (2012) 71 *Cambridge LJ* 200-222 at 202.

dignity entails treating humans as persons capable of planning and plotting their future . . . [which] includes respecting their autonomy, their right to control their future'. Of course, these values can only flourish in the conditions of relative predictability, stability and certainty that Raz rightly thinks RoL1 can bring about or maintain, but it is important not to mistake these conditions for values. For predictability, stability and certainty are not always valuable and important in and of themselves; indeed sometimes, in some contexts, they are regarded as vices. Who has not heard those on the brink of ending long-term relationships complain about the staid predictability of their lives? Variety and spontaneity, they maintain, are the spice of life, change and uncertainty life-affirming challenges. By contrast, and save for quite exceptional circumstances, liberty, autonomy and dignity are almost always valuable in and of themselves.

Fuller's account of the values served by RoL1 is not radically dissimilar to either Hart's or Raz's. Yet Fuller is less reticent than Hart in articulating these values while, somewhat surprisingly, being more oblique than Raz. Fuller's general view of law obviously informs his discussion of RoL1, but this only becomes absolutely clear in retrospect. It is touched upon late in his discussion of the eight desiderata (*ML*, 91) and made explicit thereafter. It is the idea, obvious but surprisingly often in need of restatement, that "law is the enterprise of subjecting human conduct to the governance of rules" (*ML*, 106). That being so, legal rules must have certain formal properties, many of which are manifest in Fuller's eight desiderata. Fuller claims that subjecting human conduct to the governance of rules which comply with the eight desiderata creates "a kind of reciprocity between government and the citizen with respect to the observance of rules. [...] Government says to the citizen in effect, "These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct ... "" (*ML*, 39-40; see also 91). In addition to creating this bond of reciprocity between governments and the governed, the eight desiderata also implicitly assume a

"view of man . . . [for] [t]o embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.

Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent. To judge his action by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination. Conversely, when the view is accepted that man is incapable of responsible action, legal morality loses its reason for being. To judge his actions by unpublished or retrospective laws is no longer an affront, for there is nothing left to affront – indeed, even the verb "to judge"

becomes itself incongruous in this context; we no longer judge a man, we act upon him" (*ML*, 162-163).

Both the conditions and values that Raz identifies are obviously in play here, albeit sometimes only fleetingly and in a different idiom. Law's formal properties, as identified in the eight desiderata, in conjunction with the reciprocity Fuller's claims is the essence of the relationship between law-makers and their addressees, undoubtedly establish and maintain some degree of predictability, stability and certainty in the social environment. And in that environment, 'man' can become or continue to be a responsible agent, not just answerable for his defaults but also presumably free to formulate and pursue plans and conceptions of the good. 'Dignity' and 'self-determination' are Fuller's terms for this. While his articulation of the former is not identical to Raz's, they seem to have a roughly similar idea in mind. 'Self-determination' is surely Fuller's analogue to Raz's account of autonomy and, although Fuller says relatively very little about this idea, the likeness is again hard to miss.

Hart provides the most laconic statement of the conditions maintained and values served by RoL1. This is not the sum total of what he has to say about RoL1 (or the principles of legality, as he often refers to the rule of law), but it is a significant portion:²⁷

"[t]hese requirements [of legality] and the specific value conformity with them imparts to laws may be viewed from two different points of view. On the one hand, they maximise the probability that the conduct required by the law will be forthcoming and, on the other hand, they provide individuals whose freedom is limited by the law with certain information and assurances which assist them in planning their lives within the coercive framework of the law" (*PPL*, 114-115).

He further elucidates these thoughts by pointing out that

"[g]eneral rules clearly framed and publicly promulgated are the most efficient form of social control. But from the point of view of the individual citizen, they are more than that: they are required if he is to have the advantage of knowing in advance the ways in which his liberty will be restricted in the various situations in which he may find himself, and he needs this knowledge if he is to plan his life" (*PPL*, 115).

As to the significance of the principles of legality, Hart is unambiguous:

"For any rational man, laws conferring these protections and benefits must be valuable, and the price to be paid for them in terms of limitations imposed by the law upon his own freedom will usually be worth paying" (*PPL*, 116).

²⁷ See also *The Concept of Law*, *supra*, note 1. J Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83 *New York University LR* 1135-1169 provides a full round up of Hart's remarks on the principles of legality (at 1147-1157), along with some interesting suggestions as to why Hart was so reticent when writing about them (1157-1167). Waldron tackled similar themes in 'Hart and the Principles of Legality', ch 4 of M Kramer et al (eds) *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford: Clarendon Press 2008).

Although brief, nothing in this account is incompatible with the accounts of Raz and Fuller. The conditions and values Raz identified are present in Hart's picture of RoL1 just as they are in Fuller's. Thus adherence to the rule of law, according to Hart, protects the ability to plan one's life by furnishing some degree of certainty and stability. Compliance with RoL1 principles also provides notice as to when one's freedom is likely to be curtailed. But why are stability, certainty and notice important, if not as ways of upholding or protecting autonomy and liberty? The main problem with Hart's account is thus not one of incompatibility with the others but of brevity: he leaves so much unsaid that we cannot be absolutely certain he would accept those aspects of Raz's and Fuller's accounts – the emphasis on autonomy, for example, or the 'view of man' invoked – that go beyond his. Only by turning to Hart's non-rule of law writings do we discover his views on matters such as this.²⁸

B. A forgotten value?

Each of these accounts holds that RoL1 can enhance the stability of the environment in which agents exist. RoL1 therefore allows agents to go about their everyday lives with some degree of certainty and facilitates their more long term planning, in the sense of setting and pursuing life goals. For Raz, adherence to RoL1 increases predictability and thus can 'increase one's power of action', while Fuller characterises this in terms of reciprocity ('these are the rules we expect you to follow, if you follow them they will be applied to your conduct'). Hart terms this the 'advantage of knowing in advance the ways in which . . . [one's] liberty will be restricted', which allows one to plan one's life. We should not exaggerate RoL1's role here, for it surely cannot bring about conditions of relative predictability, certainty and stability on its own – much will depend upon other conditions obtaining in the society in question. Yet, in two societies roughly comparable in terms of the broader social conditions that bring about and sustain order, Hart, Fuller and Raz would probably maintain that that in which the rule of law obtains is that which has a greater degree of stability, certainty and predictability and thus facilitates better the planning and pursuit of everyday lives and life-goals.

The predictability, stability and certainty enhanced by RoL1 assuredly provide fertile ground for one value not yet mentioned: freedom as non-domination. Contemporary civic republicans hold that this conception of freedom is distinct from both positive and negative conceptions. It is, according to Philip Pettit,

²⁸ See his *Punishment and Responsibility* (Oxford: Clarendon Press, 2nd ed, 2008) chs II and IV-VIII; and *Law, Liberty and Morality* (Oxford: Clarendon Press 1963).

“negative to the extent that it requires the absence of domination by others, not necessarily the presence of self-mastery, whatever that is thought to involve [and]. . . positive to the extent that . . . it needs something more than absence of interference; it requires security against interference, in particular against interference on an arbitrary basis.”²⁹

Domination looks like this: “[o]ne agent dominates another if and only if they have a certain power over that other, in particular a power of interference on an arbitrary basis”.³⁰

That arbitrariness is the core of domination on this account of freedom might make it particularly enticing as a statement of the value served by RoL1. The temptation is one of intellectual tidiness and symmetry: an account of the rule of law that sees a connection between it and arbitrariness, such that the latter tells us what is wrong when many rule of law principles are breached, is a neat fit with an account which holds that non-domination (in the sense of freedom from arbitrary power) is the value protected by the rule of law.³¹ I do not think it completely wrong to succumb to this temptation, but at least two caveats must be noted before falling headlong in love. The first caveat in this intellectual pre-nuptial agreement involves noting that the temptation undoubtedly has other grounds. One such ground is that the idea of non-domination is consistent with the substance of what Fuller, Hart and Raz actually say about the importance of stability, predictability and certainty for human beings living in groups. Yet there might be an urge to put the point in stronger terms: what other concern or value, if not *something very like* non-domination, can inform these remarks? The second caveat is no less obvious. It reminds us that to accept non-domination as a value served by RoL1 does not, at first glance at least, commit us to the view that it is the only value served by RoL1.

And there are, for Raz, Fuller and Hart, clearly other values in play. The predictability, stability and certainty that RoL1 maintains allows autonomy to take root, understood as the power to formulate and pursue a general life plan. Autonomy is an expansive value, since it embraces not just liberation from and control over some of one’s wants and desires, but also some realm of non-interference from others such that one is free to pursue some of one’s (second-order) wants and desires. While only Raz explicitly speaks of autonomy as a value protected by RoL1, Hart and Fuller implicitly accept its connection with RoL1 insofar as both recognise that the rule of law respects an agent’s ability “to plan

²⁹ P Pettit, *Republicanism* (Oxford: Clarendon Press 1997) 51. See also Q Skinner, *Liberty Before Liberalism* (Cambridge: CUP 1998) ch 2. Arthur Ripstein reminds us that what Pettit terms “security against interference” looks very similar to right of independence at the core of Kant’s legal and political philosophy: *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, Mass.: Harvard UP 2009), at 15 and ch 2.

³⁰ Pettit, *ibid*, 52.

³¹ Note that for Pettit (*ibid*, 55) arbitrariness is a much narrower notion than for us.

his life" (*PPL*, 115) or "his powers of self-determination" (*ML*, 162). Furthermore, this ability and these powers surely explain Raz's invocation of dignity – 'respecting human dignity entails treating humans as persons capable of planning and plotting their future' – and animates Fuller's statement of the 'view of man' implicit in RoL1. That view is one of humans as responsible agents, capable of self-determination. Hence "[e]very departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent" (*ML*, 162). The value of freedom from constraint is also significant for Hart and Raz. While neither seems to regard law as compatible with freedom in this sense, both nevertheless maintain that legal systems which adhere to the principles of RoL1 are valuable because they provide their addressees with notice as to when the law's coercive force will be felt (assuming that the law is consistently and assiduously enforced). Knowing when one's liberty will be restricted in this way allows one, as Hart notes, to better plan one's life. This knowledge, for Raz, adds to the predictability of one's environment and makes one's ability to choose between options 'effective'. It is in this sense that the rule of law "may be yet another way of protecting personal freedom" (*RofLV*, 204).

At this point the effort to show that the value of non-domination informs RoL1 seems foolish. Since autonomy, dignity and freedom (as absence of constraint³²) are undoubtedly in play, why attempt to shoehorn freedom as non-domination into this picture and portray Raz, Hart and Fuller as unwitting civic republicans? That freedom as non-domination does not feature explicitly in RoL1 is not a conclusive objection to this effort since, if the story contemporary civic republicans tell of the invention, loss and rediscovery of this value is plausible, then we should not expect it to figure in work of this vintage. We should nevertheless (the story goes) expect freedom as non-domination to make sense of many of our contemporary political and juristic idioms, since the notion exerts significant gravitational pull even though we have been blinded to its presence. But is there anything more that can be said of the effort to show that non-domination informs RoL1, than that it is not incompatible with the values and conditions proponents of RoL1 themselves emphasise?

One possibility is this: the value of non-domination is worth inserting into the picture of the values served by RoL1 because it synthesises into a harmonious whole the apparently discrete values and conditions upheld by RoL1. The initial plausibility of this claim derives from the fact that non-

³² Fuller is a bad fit in a list of jurists interested in and committed to a conception of freedom as absence of constraint. He is in general very quiet on the link between RoL1 and freedom (however understood) in *The Morality of Law*: the book has no index entries for the terms 'liberty', 'freedom', or 'coercion'. Other work suggests that Fuller's conception of freedom extends beyond simple freedom from constraint: see, for example, his 'Freedom: A Suggested Analysis' (1955) 68 *Harvard LR* 1305-1325. A helpful overview of Fuller's position on freedom is K I Winston, 'Legislators and Liberty' (1994) 13 *Law and Philosophy* 389-418. For some interesting thoughts on another of Fuller's freedom papers see Rundle, *supra*, note 5 at 108-112.

domination is compatible with the values Raz, Hart and Fuller emphasise. Moreover, freedom from constraint, autonomy and dignity all surely inform or can be seen as aspects of freedom as non-domination. The latter could therefore stand as the master-value served by RoL1. Yet this is to move far too quickly, since the compatibility between freedom as non-domination and the other values, and the former's synthesising role, demand closer greater scrutiny. If the alleged compatibility relation is bogus, then freedom as non-domination can have no synthesising role.

The compatibility claim appears reasonably plausible with regard to some of these values. Pettit's claim, for example, that freedom as non-domination and autonomy are closely connected – "it is bound to be easier for people to achieve autonomy once they are assured of not being dominated by others"³³ – seems undeniable. But an obvious sticking point for the compatibility claim is freedom as non-constraint. For, although contemporary civic republicans have recognised this value either as an independent concern of the neo-republican tradition standing equal alongside other values, or as a subsidiary value important because of its possible effect upon freedom as non-domination, this inclusionary spirit is not displayed by many proponents of freedom as non-constraint.³⁴ Those proponents usually regard freedom as non-constraint as incompatible with freedom as non-domination, the former being, on their view, simply conceptually and normatively better as an account of freedom than any of the alternatives.³⁵ It is therefore no surprise to find them arguing that freedom as non-domination occupies no distinct conceptual space, there being no significant difference between it and freedom from constraint.³⁶

That this dispute must be resolved before freedom as non-domination could play its synthesising, unifying role with regard to the other values that RoL1 upholds is obvious. Equally plain is that neither time nor space allow an attempt at resolution here. Furthermore, even if such a resolution were forthcoming, something must be said in addition in favour of synthesis and unity in this context. Neatness is not in and of itself a self-evident intellectual virtue and we might, therefore, have to illustrate the practical or other advantages of this strategy. For these reasons, then, the Scots law verdict of 'not proven' seems the most appropriate judgement to make upon freedom as non-domination's synthesising role. Henceforth I'll assume that RoL1 serves at least four distinct and thus to some extent independent values: dignity, autonomy, freedom from constraint and freedom as non-domination.

³³ Pettit, *supra*, note 29, 82.

³⁴ The former is Skinner's view (*supra*, note 29 at 82-87), while the latter is Pettit's (*supra*, note 29 at 300-302).

³⁵ See the story as told in Pettit, *supra*, note 29, 297-299.

³⁶ See M Kramer, *The Quality of Freedom* (Oxford: Clarendon Press 2003) ch 2.

C. Private law, values, arbitrariness

There is little doubt that, among the values informing and served by private law, autonomy, dignity, non-domination and freedom from constraint loom large. A reminder is provided by Charles Fried's elegant and entirely orthodox view of some of the key components of private law and the way they hang together:

"[t]he law of property defines the boundaries of our rightful possessions, while the law of tort seeks to make us whole against violations of those boundaries, as well as against violations of the natural boundaries of our physical person. Contract law ratifies and enforces our joint ventures beyond those boundaries. Thus the law of torts and the law of property recognise our rights as individuals in our persons, in our labour, and in some definite portion of the external world, while the law of contracts facilitates our disposing of these rights on terms which seem best to us. The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights".³⁷

The law of tort and property thus protect a sphere within which agents are free from constraint. Both bodies of doctrine, alongside the injunctions of the criminal law, set parameters within which law's addressees are in principle free from the coercive intervention of other addressees. Furthermore, this sphere serves as protection against the arbitrary power of other ordinary citizens *as well as* against that of corporate and government bodies (assuming the latter to be subject to the ordinary (private and criminal) law of the land).

The kinds of arbitrary power against which citizens are protected, to some degree at least, by these areas of private law are primarily instances of S1 and S2 arbitrariness (with the exception, in the latter case, of 'vires' arbitrariness). By delineating and stabilising not only agents' holdings and the ways in which they can be legitimately transferred, but also by protecting the boundaries of the physical person, private law forms an obvious bulwark against the exercise of power without warrant. The scheme of rights and entitlements embodied in private law constitutes a *prima facie* hurdle, which must be surmounted through legal means or brazenly discarded, to the exercise of such force. And even when that hurdle is overcome, the overcoming remains either regrettable (as when such rights and entitlements are legally overridden) or plain wrong (when there is no such legal license). Tort and property law do not provide any specific protection against S3 arbitrariness, save that the inconsistent exercise of power will run up against the parameter set by these rights and entitlements. If, for example,

³⁷ *Contract as Promise* (Cambridge, Mass.: Harvard UP 1981), 1-2. For what I take to be an interesting statement of the same point, but in quite different language, see S Shapiro, *Legality* (Cambridge, Mass: Harvard UP 2011) at 134.

I am a particularly capricious power-wielder, I can only advance my friends and disadvantage my enemies in ways consistent with their equal bundles of private law protections. My inconsistency is thus to some degree disciplined and constrained but not, of course, eliminated.

That these areas of private law putatively protect all legal persons against the arbitrariness of all other legal persons will surprise only those gripped particularly tightly by the public law perspective. From this perspective, the only worrisome sources of potentially arbitrary power in the world are law-makers and their executive functionaries. One common accompanying claim holds that these sources of power are particularly troubling because of the scale of the power deployed: it is so all-embracing as to make the holders and their use of it especially worthy of concern. Yet another, equally common supplementary claim insists that the rule of law's importance is that it 'cabins, cribs and confines' this perhaps unique power.³⁸ But we need not deny that lawmakers and their executive functionaries are indeed vexing sources of potential arbitrariness, nor must we question some of the assumptions here – Is the scale of this power truly unique? How might we measure it? With what should we compare it? – for this point to stand: that the world contains *other* worrisome sources of potentially arbitrary power. One such source is surely one's fellow citizens, as well as other legal (non-governmental or non-executive) persons.

If the sphere of freedom from constraint that tort and property law create is relatively stable, then they serve to notify agents when they are likely to run up against, and when they will be free from, juridical interferences from others. That function, of course, is one that RoL1 also performs: both private law and RoL1 give addressees the "advantage of knowing in advance the ways in which . . . [their] liberty will be restricted" (*PPL*, 115). That knowledge facilitates the pursuit of life goals and choices of the kind which mark an autonomous life, its provision – via relatively stable and enforced legal rules – embodying respect for human dignity as conceived by Raz and Fuller. The possibility of those choices is further protected and extended by facilitative areas of private law such as contract law and trusts. These bodies of law do not hold spheres of freedom steady, like tort and property law do, but allow law's addressees to embed plans in the future and thus extend their freedom across time. They therefore facilitate autonomy and embed respect for human dignity in a somewhat different way than do tort, criminal and land law.

The exact degree of certainty contract and trusts give to future plans depends not just upon the details and means of enforcing these areas of law, but also on the general conditions obtaining in the particular society in question. Yet even if addressees are dependent solely upon the law for stability,

³⁸ I am, of course, echoing Macbeth: Act 3, sc 4, l 23 (*The Tragedy of Macbeth*).

that still seems better than a solitary, nasty, brutish and short state of nature. That legal systems, when compliant with RoL1 principles and containing certain substantive private and criminal law components, facilitate the pursuit of life-plans by their addressees is plainly not an insight. But repeating the point reminds us why talk of autonomy, as well as of liberty and of non-domination, is appropriate here. The ability to formulate and pursue life-plans is a vital component of all plausible accounts of the nature of autonomy; that that ability requires some realm of freedom from constraint for its realisation is equally obvious. The certainty that contract, trusts and other facilitative areas of private law can confer on future plans and transactions also serves as insurance against domination for, insofar as no one other than the transacting parties has the power to end contracts, trust arrangements and other dispositions of holdings, those contracts, arrangements and dispositions are secure against interference. If any or all of the contracts and other arrangements one enters into can be ended at the whim of another not privy to those transactions, then those transactions and, in a sense, one's self, are in the thrall of that other. That is domination, not freedom.³⁹ By protecting against this particular form of domination, these areas of private law also act as bulwarks against S1, S2 and S3 arbitrariness.

Detailed examination of particular private law doctrines – those dealing with vitiating factors in contract, for example, or the various conditions for agency in tort – would disclose how deeply the values of non-domination, freedom from constraint and autonomy are embedded in the law.⁴⁰ But there is another way, noted by Raz, in which private law can uphold or facilitate these values. His observation that RoL1 functions as a “policy of self-restraint to make the law itself a stable and safe basis for planning” (*RofLV*, 203) is surely undeniable. Also undeniable, and of obvious relevance to private law as it has developed and been understood in the common law world, is the claim that law can “stabilise social relationships . . . which may disintegrate or develop in erratic or unpredictable ways” (*ibid*). It is not Whig-ish to think that those areas of private law most commonly claimed to have developed from, and been associated with, customary norms and standards of behaviour might have played exactly this role. If that was the case, and possibly still is the case, then private law again engenders precisely the same values as RoL1. The values served by some degree of stability, predictability and certainty in our collective and individual lives are the core of both RoL1 and private law.

³⁹ “What constitutes domination is the fact that in some respect the power-bearer has the capacity to interfere arbitrarily, even if they are never going to do so”: Pettit, *supra*, note 29, 63. For further thoughts on the nature of interference, see P Pettit, ‘Law and Liberty’, ch 1 of S Besson and J L Marti, *supra* note 25, at 42-49.

⁴⁰ I have quite rightly been reminded that the misuse of process and misuse of public power torts ought not to be overlooked here: see J Murphy and C Witting, *Street on Torts* (Oxford: Clarendon Press, 13th ed., 2012) ch 23.

Finally, it is important to stress the exact nature of my argument against the public law perspective in this subsection. I have claimed only (i) that there is a source of potential arbitrariness in addition to those (lawmakers and their executive functionaries) that are the focus of that perspective; and (ii) that there are plausible senses in which private law addresses that source of arbitrariness. Once this is accepted, it becomes tempting to regard private law and public law as quite different forms of constraint upon power and arbitrariness. Private law can be viewed as a constraint upon ‘horizontal’ arbitrariness, by which is meant that it impedes the power (*de jure* and *de facto*) deployed by all addressees of the law. While those addressees might differ in many ways – they may be either human or corporate legal persons, public or private legal persons, state or non-state legal persons – they are also assumed, in most modern legal systems, to have the same legal standing. They supposedly have equal bundles of the same legal rights, duties, liabilities and powers, private law in part distributing and stabilising those bundles as well as constraining their exercise. In guaranteeing the same bundle of rights for all addressees of the law, and by holding all addressees of the law (in principle at least) to respect the bundle of rights of all other addressees, private law establishes a form of horizontal juridical equality: all have the same legal standing.

Where some legal persons or actors have different legal standing, having for example greater legal powers or immunities than others, then that asymmetry is often regarded as especially worthy of attention. Lawyers may well come to think that these especial powers and immunities require unique forms of legal regulation: the power here looks exceptional because it is deployed by legal persons who do not stand equal with all other legal persons. The arbitrary power that such exceptional legal actors may exercise therefore looks like vertical rather than horizontal power, a potential juridical sword of Damocles hanging over all other legal persons. Within the common law world, public law is usually seen as the means of disciplining the vertical power deployed by the state, the state being conceived as an exceptional source of power in either *de jure* (its exceptional powers, duties, liabilities and immunities being enshrined in law) or *de facto* (the power it displaces is simply unique among all other sources of power) terms.

Thus stated, the temptation of the vertical/horizontal distinction is clear but so, too, are its hazards.⁴¹ One such is that of slipping from this helpful distinction into another thoroughly misguided distinction, namely, one holding that public law and private law have entirely different target domains, the former being concerned solely with the realm of the state and the latter with the realm of the

⁴¹ There is a rough analogy between this version of the distinction and the direct effect of some EU law provisions. See *Defrenne v. SABENA* (Case 2/74) [1974] ECR 631 for background. Gerald Postema’s essay in this volume . . . provides an altogether more sophisticated statement and deployment of the distinction than that in this essay.

private (or non-state). There are few helpful senses in which the state, understood in anything like a plausible way, is absent from modern systems of private law: at the very least, the state upholds the court structure, funds the judiciary and the mechanisms of enforcement that those systems rely upon for their efficacy. Furthermore, various aspects of the state, from central to local government bodies and all their cognates, are players in the system of private law just like other legal persons – they enter contracts, commit torts, overpay and fail to pay bills. Whether or not the power of the state is either *de facto* or *de jure* unique, the latter point reminds us that in common law jurisdictions, at least, the state is merely one among other players in the private law system. The various roles the state plays with regard to private law have little or no bearing upon the distinction between vertical and horizontal power-cum-arbitrariness.

D. Choosing

If autonomy, dignity, freedom as non-domination and freedom from constraint are upheld by both RoL1 and large swathes of private law, and if each of these values is indeed *genuinely independent of the others*, then we can turn to the final question of this section: must we choose between them? Must we, that is, insist that only one of these values can inform RoL1 and private law or, slightly different, that only one such value dominates? The thought that we must so insist arises from the idea that these values are in principle incompatible and therefore have to be related or subsumed in such a way as to avoid clashes. ‘Relating’ these values involves the utilisation of priority-rules or other conflict eradicating principles, while the most common way of ‘subsuming’ apparently different values so as to ensure compatibility between them is to show that they are in fact aspects of one single master-value.⁴² The former gambit is not considered further here, for the simple reason that, while legal systems abound with ordering and priority rules, none of them explicitly order specific values in the way envisaged here. The most such rules do is prioritise other rules or processes, some of which might of course embody or uphold the values of dignity, autonomy, freedom from constraint and freedom from domination. Yet charting the legal rules which rank other legal rules and processes, and determining which of the latter embody or uphold which of these values, requires a comprehensive survey of a whole legal system and that cannot be undertaken here. Our attention in what follows therefore falls exclusively upon the ‘subsumption’ gambit.

⁴² In moral philosophy ‘intuitionism’ was long regarded as the position opposed to both of these gambits: a classic discussion is J O Urmson’s ‘A Defence of Intuitionism’ (1974) 75 *Proceedings of the Aristotelian Society* 111-119.

We took a fleeting look at this gambit in subsection B, concluding that freedom as non-domination might well fulfil this role. Which is to say: there does indeed appear to be room for freedom as non-domination to capture, accommodate and harmonise all the concerns and interests salient within dignity, autonomy and freedom from constraint. But, since we had no argument actually showing that to be the case, this gambit is as yet unsubstantiated. Furthermore, while there are no *a priori* objections to the effort to show that the ostensibly different values served by RoL1 are in fact different aspects of some master or all-embracing value, there are some general reasons to doubt that this strategy will be a complete success. One is the sheer implausibility of every instance of the subsumption strategy leaving no remainder, that is, no residual instance or category which cannot be accommodated by the subsuming value. Another is the moral and political bluntness manifest by legal systems and many aspects of their institutional design.⁴³ Unlike the first reason, this one requires elucidation.

By legal institutional design, I refer to the animating ideas, substantive doctrines and more general features of any reasonably complex legal system. The law of contract in England and Wales is a substantive doctrine of that legal system and an aspect of that jurisdiction's legal institutional design; so, too, are its system of precedent and the standard patterns of justification used by its appellate court judges when deciding hard cases. The way in which trials are organised and the nature of the court structure, along with procedural rules and those controlling access to the courts, are also aspects of a jurisdiction's legal institutional design. Among the animating ideas of a legal system, we must include not just its general concepts of culpability, responsibility, reasonableness, causation and the like, but also its professed animating ideals, such as impartiality, justice and fairness. Little weight should be placed upon the 'design' component of the term 'legal institutional design', particularly if it suggests the deliberate implementation of a detailed prior plan. In common law (and perhaps other) legal systems, features of institutional design are just as likely to have evolved piecemeal as to be the products of such advanced planning.

The moral and political bluntness of many areas of legal institutional design has two aspects. First, some such areas are blunt insofar as they "do not precisely embody any moral [or political] principle. Blunt laws are obliquely related to the values that they serve, and they may be so related to several distinct and perhaps incompatible values."⁴⁴ I take 'precisely' here to mean 'any single', so that blunt areas of legal institutional design are compatible with more than one moral or political principle; hence the 'obliqueness' relation flagged up in the second sentence is a multiple relation. That, of course,

⁴³ A classic statement is N E Simmonds, 'Bluntness and Bricolage', ch 1 of H Gross and R Harrison (eds.), *Jurisprudence: Cambridge Essays* (Oxford: Clarendon 1992).

⁴⁴ Simmonds, *ibid*, at 12.

is but another way of saying that some legal rules and doctrines appear perfectly compatible with different values that might be generated by incompatible moral and other normative theories. Pondering a few examples illustrates the sheer obviousness of this point.

Take the rule established by the Court of Appeal in the English contract case of *Williams v. Roffey Bros*, that merely doing what one is already contractually bound to do can in some circumstances be good consideration for a subsequent promise to pay extra.⁴⁵ This rule could surely just as well be supported by either deontological or utilitarian principles of either positive or critical morality. So, too, could many other rules of private law. Of course, it might be argued that the moral values invoked to support the rule in *Williams v. Roffey* are not substantively different but ‘merely’ meta-ethically different. Substantively similar moral values might, that is, be generated by moral theories that are incompatible in terms of what they regard as morally important, or different in terms of the account they offer of the nature, basis, and range of moral knowledge. If incompatible meta-ethical theories can converge in terms of their substance, then they could generate identical judgments about the rights and wrongs of legal decisions like *Williams v. Roffey*. Yet this does not undermine the current point about the bluntness of some legal rules and doctrines; it reinforces it. For, if different meta-ethical theories converge on substantive judgments, and those judgments are embodied in, or consistent with, the same areas of law, how can the legal doctrines and decisions that embody them favour one meta-ethical theory over another? It is, instead, surely reasonable to expect such legal doctrines and decisions to be blunt between such competing meta-ethical theories.

It could be objected that the case in favour of legal doctrinal bluntness is made too easy by the assumption that substantive legal doctrines and other aspects of legal institutional design should favour one meta-ethical theory over another. Deniers of bluntness might argue that they certainly have no such expectation of legal doctrine. What they expect, rather, is that particular legal doctrines and rules will be supported by or compatible with only one substantive moral or political principle. If this is indeed their expectation, then the best way to show that it is reasonable is by producing supporting examples. This task seems on its face fairly difficult; an indication of this can be gleaned by considering almost any tort case. What single substantive moral or political principle, for example, uniquely supports the decision in *Donoghue v. Stevenson*?⁴⁶ Which such principle is unique in its ability to support the ruling in *Bolton v. Stone*?⁴⁷ Rather than discovering one such principle for any particular case, we seem more likely to face

⁴⁵ [1991] 1 QB 1 (CA).

⁴⁶ [1932] AC 562 (HL).

⁴⁷ [1951] AC 850 (HL).

a glut of substantively somewhat different moral principles, all capable of supporting a single decision or doctrine.

The second aspect of moral and political bluntness highlights the possibility that some legal rules and doctrines can be completely without moral or political support, in the sense that neither a specific meta-ethical theory nor a particular substantive moral principle confers salience upon them. The point is that substantive moralities might themselves be blunt in the sense that they lack the wherewithal to provide answers to specific legal doctrinal questions.⁴⁸ This should not be a surprise. In broad terms, positive moralities are a matter of rules of thumb that engage only with the generalities of morally commendable and morally objectionable conduct. When faced with dilemmas and other instances of crisis, as well as with matters of detail, positive morality is least likely to guide us. Critical moralities can and sometimes are intended to fill this void, but building a complete theory of moral right and wrong on the basis of exceptional cases is itself problematic.⁴⁹ Whatever we might think about the capacity of both positive morality and particular critical moralities to generate answers to specific questions, one thing is clear: neither kind of morality appears well equipped to support or answer the specific, detailed doctrinal questions that arise in the appellate courts. Think again of *Williams v. Roffey*. Is it sensible to expect an answer from either positive or a critical morality to the question of whether doing what one is already contractually bound to do is good consideration for a subsequent promise? Or reasonable to think that morality, of whatever kind, generates a single answer to the question raised in cases like *South Australian Asset Management v. York Montague Ltd.*, about the range of a valuers duty?⁵⁰ The answer to these questions is most likely a resounding ‘no’, and not only because some legal rules are merely matters of *determinatio* or convention.⁵¹ Bluntness also plays a role.

What does all this have to do with the rule of law? My suggestion is that the rule of law, understood either as RoL1 or more expansively, is among the animating ideals of many legal systems and, along with other aspects of legal institutional design, is quite likely to display some degree of moral and political bluntness. What we have seen from our sketch of the work of Fuller, Hart and Raz surely reinforces that: each of them maintains that the rule of law upholds a range of (admittedly closely related) values and their various preconditions. If they are indeed right about that, then it is perfectly

⁴⁸ A related claim is that different political theories – different accounts of the nature of freedom, for example – generate no (or no significant) institutional differences when ‘operationalised’: see D Dyzenhaus, ‘Response to Ian Shapiro, ‘On Non-Domination’ (2012) 62 *University of Toronto Law Journal* 337-346 at 339-341.

⁴⁹ They are, by definition, unlikely to be a good guide to the generality of our moral beliefs.

⁵⁰ [1996] 3 All ER 365 (HL).

⁵¹ For a discussion of *determinatio*, see J Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 2nd ed. 2011) at 284-89.

permissible to hold that RoL1 displays the first aspect of normative bluntness. And, if it does, then there is plainly no need, as a philosophical or theoretical matter, to choose between the ostensibly discrete values that inform RoL1. As a practical matter, a choice might be necessary in substantive, legal doctrinal contexts in which these different values could generate different interpretations of particular legal rules or concepts. Where such interpretations themselves generate different outcomes in a contested case, then judges will have to choose between them and that, in effect, is a matter of choosing between the underpinning and now competing values. But this possibility is perfectly compatible with the claim that those interested in understanding the law in general terms need not make such a choice – their role is not, after all, to resolve particular legal disputes. Furthermore, a judicial choice along these lines will not foreclose the possibility of different choices being made by other judges, unless the choice in question is an unambiguous, unanimous and binding supreme appellate court decision.

IV. ENDPOINT

The rule of law and private law are not strangers. They protect against the same ill – arbitrariness – maintain the same conditions and serve the same values. The task of highlighting this functional unity or similarity is neither an insight nor an advance, but a series of reminders about what we lawyers have long known. In the course of issuing these reminders I have tried to substantiate two other subsidiary claims: (i) that there is a helpful and important link between the rule of law and arbitrariness, such that the latter often tells us what is wrong with breaches of the former; and (ii) that the effort to synthesise the ostensibly discrete values upheld by the rule of law and private law is likely to fail. I have also attempted to loosen the grip that the public law perspective has upon our thinking about the rule of law. These various tilts at multiple windmills might well be mistaken; my hope is that they are, at the least, interestingly and informatively mistaken.